P.M., in the State of Wyoming. The Wyoming Oil and Gas Conservation Commission has approved defendant's application for a permit to drill a well for oil and gas on said portion of defendant's right of way.

8. Defendant has not applied for or obtained a lease under the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301.

9. Paragraph 4 of the complaint shall be considered amended to read as follows:

A portion of the right of way granted by the described Acts of Congress, and now used by the defendant in operating and maintaining a railroad traverses land described as the N½ NW¼, Section 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming wherein the plaintiff is the owner of the mineral rights.

Paragraph 4 of the answer shall be considered amended to read as follows:

Denies the allegations of Paragraph 4 of the complaint except admits and alleges as follows: Defendant admits that a
7 portion of the right of way granted by Acts of Congress and now used by defendant in operating and maintaining a railroad traverses land described as the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. Defendant also admits that with the exception of the lands within the right of way, title to the mineral rights in said described land is in plaintiff. Defendant alleges that plaintiff's only interest in said right of way is an implied possibility of reverter and that all other right, title and interest in said right of way is in defendant.

10. A portion of the right of way granted by the Acts of Congress referred to in Paragraph 3 hereof traverses land described as the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The nature of the title to and the parties' interest in said portion of the right of way is the subject of this litigation. Other than such right of way, there is no dispute that the title to the mineral rights in the land described in this paragraph is and at all time pertinent hereto has been vested in the United States.

11. By the use of the term "right of way" the parties do not agree as to the nature or extent of the property or estate conveyed, and nothing herein shall be construed as barring either party from making any argument with respect to the nature or extent of the estate or property, or the incidents of title held by defendant, Union Pacific Railroad Company, under the Acts of Congress referred to in Paragraph 3 hereof.

12. Each of the parties hereto reserves the right, upon the trial of said cause, or at any hearing thereof, to introduce other testimony,

oral or documentary, not inconsistent with the facts herein stipulated.

13. This stipulation shall be introduced in evidence at the trial of this case.

14. This stipulation is for the purpose of this case only, and is made without prejudice to the rights of either party in any other action and may not be used by or against either party in any other action.

15. This stipulation does not supersede or eliminate from the consideration of the Court the pleadings in this action.

8 Dated October 20, 1954.

JOHN F. RAPER, JR.,
United States Attorney.
THOS. L. MCKEVITT,
Attorney, Department of Justice,
Attorneys for Plaintiff.
JOHN U. LOOMIS,
WILLIAM W. CLARY,
WARREN M. CHRISTOPHER,
Attorneys for Defendant.

Filed October 20, 1954.

In United States District Court

JUDGE'S MEMORANDUM.—December 30, 1954

KENNEDY, Judge.

Dated December 30, 1954.

This is an action in which the United States, as plaintiff, seeks an injunction permanently restraining the defendant from using its right of way as a railroad for the purposes of removing gas, oil and minerals therefrom and quieting title to such minerals in plaintiff. The defendant answers in the form of a denial of the claim of plaintiff and sets forth certain affirmative rights claimed in its behalf.

At the trial the parties entered into an agreed statement of facts which eliminated practically all oral testimony except that presented on behalf of the defendant concerning its use of its right of way for the purpose of producing oil and gas as not interfering in any way with the operation of its railroad.

Reviewed, briefly, the stipulation of facts set forth the jurisdiction of the court; the corporate organization of the defendant and that it is the successor to all the rights of the original grantee under a right of way over the public domain under the Acts of July 1, 1862, as amended by the Act of July 2, 1864, for railroad and

telegraph line purposes, and that it has continuously exercised such right up to the present time; that defendant intends to engage in drilling operations leading to the removal of subsurface oil and gas underlying its right of way a few miles west of the city of Cheyenne and that the Wyoming Oil and Gas Conservation Commis-
9 sion has approved defendant's application for a permit to drill on that portion of defendant's right of way; that defendant has not applied for or obtained a lease under the Act of May 21, 1930, from the United States; and that the matter in dispute between the parties is as to the nature and extent of the property or estate which defendant holds under the Acts of Congress referred to.

In addition to the stipulation the defendant over the objection of the plaintiff as to relevancy introduced evidence tending to show that the drilling and operation of oil and gas wells on the right of way would in no way interfere with the operation of its railroad and telegraph line facilities. This evidence was admitted over the objection of the plaintiff at the time upon the theory that being a Court-tried case the evidence might be rejected if not found pertinent to the issue involved. After the trial the case was presented to the Court extensively in oral argument and at the conclusion, inasmuch as it had been intimated that briefs had been exchanged by the parties previous to the argument, it was suggested by the Court that such trial briefs should be submitted with such additional addenda as counsel might be advised within a time fixed by the Court. This order has been complied with and the matter is now before the Court for consideration.

It would seem that the particular issue here to be resolved heads into virgin legal territory, as counsel seem to agree that there are no cases which form a precedent as being on all fours with the case at bar. In some respects it would seem unfortunate that perhaps on account of the particular area involved being within the Wyoming District (the location being only a few miles west of the city of Cheyenne) the lot falls to the presiding judge of the United States trial court of such District to first attempt a solution of the problem. Probably the most efficient service that this Court may render is to expedite its journey into the higher Federal Courts so that the rights of the parties may be declared as speedily as possible. With this in view this Court will attempt to state its views and reactions only to the extent that adequate findings and conclusions may be based thereon.

It appears that the original grant to the defendant's predecessor was a right of way to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including necessary grounds for stations, etc. When the grant did not appear adequate to secure construction of the railroad an

amended Act was passed in 1864 which continued the original grant as a right of way but also granted to the railroad alternate additional sections on each side in fee simple but reserving or excepting therefrom mineral rights or lands, with certain exceptions.

Scores of cases have been cited by counsel which in a sense touch only the periphery of the exact question here to be determined. It would seem rather unnecessary to discuss them in detail in this memorandum. Suffice it to say that counsel are to be commended for the exhaustive manner in which they have prepared their respective contentions and demonstrated their exhaustive research of the authorities in presenting the case to this Court.

Among the many cases so cited may be mentioned Northern Pacific Railroad Company v. Townsend, 190 U.S. 267, and Great Northern Railway Company v. United States, 315 U.S. 262, out of which counsel for plaintiff seem to derive some comfort from the language of these decisions. This is seriously questioned, however, by counsel for defendant, inasmuch as the situation calling for a decision in these cases is not analogous to the situation in the case at bar. Two of the cases strongly relied upon by defendant are New Mexico v. United States Trust Company, 172 U.S. 171, and United States v. Illinois Central, 89 F. Supp. 17 (affirmed United States v. Illinois Central, 187 F. 2d 374). Perhaps the latter case comes nearer to suggesting a precedent in the case at bar than any others inasmuch as it definitely decided that the defendant under a right of way originally granted by the United States to a State had a right to extract oil therefrom and that the United States had no present interest in such oil. The New Mexico case, supra, related to the matter of taxation of improvements on a right of way in which the integrity of such right was protected against such taxation. In the Northern Pacific Railroad Company case, supra, the right of way was again protected against homesteaders filing thereon. In the Great Northern Railroad case, supra, the contest was under the right of way Act of March 3, 1875, in which it was decided that the right of way under that Act was an easement only and conferred on the grantee no right to oil or minerals underlying the right of way. This latter case, however, should be considered in connection with the fact that after 1871 the United States modified its policy in connection with grants of this character. After this time rights of way were granted with a more restrictive character than is embraced in the one under consideration here, as, for example, in 1884 Congress exercised its authority to grant a right of way through an Indian Territory which contained a proviso that the lands granted should be used for such purposes only as shall be necessary for the construction and convenient operation of the

railroad, etc. Various attempts have been made to encroach upon the original grants of right of way but generally speaking the courts have consistently operated to protect integrity of such original grants as, for example, in Union Pacific Railroad Company v. Laramie Stockyards Company, 231 U.S. 190, where the attempt was made to acquire title by adverse possession under an Act of Congress authorizing the same, it was held that the Act could not be enforced retroactively as against the original grant. Many of the courts, including that of the Supreme Court, have sought to define this so-called right of way using expressions "determinable right of way with reverter" (if ceased to be used for the original
11 purpose indicated); a "limited" fee; a "qualified" fee; a "base" fee, and it is indicated strongly in these cases and in other texts that the possibility the fee may last forever renders the estate therein a so-called "fee". At least it may be gathered from these authorities that the fee here under consideration being absolute and without restriction except as to possible reverter, is some different sort of a grant other than a mere easement as that term is generally understood.

Some suggestion has been made that the point in controversy might be ruled by Wyoming law inasmuch as the property is located in this state. There seems to be no controlling precedent either in the Wyoming law or the decisions of its Supreme Court. It is not the intention of this Court to indicate that the situation is controlled by the law of the state of Wyoming inasmuch as it involves the construction of a federal statute. However, counsel for defendant derives some comfort in a statement of the Wyoming Supreme Court in Johnson Irrigation Company v. Ivory, 46 Wyo. 221, involving the rights of homesteaders in connection with a Congressional grant of rights of way for ditches, canals, reservoirs and irrigation works, in which citation the Court in its opinion at page 239 uses the following language:

* * * "We may also agree that a grantee who takes a limited or qualified fee, liable to be defeated whenever he ceases to use the land for the purposes specified in the grant, may, while the estate continues, have the same rights and privileges as an owner in fee simple."

Counsel for plaintiff rely also upon administrative precedents as being persuasive and also upon the fact that for years the defendant has never attempted to exercise the right which it now claims, but in the final analysis these points could only be advanced as persuasive and not decisive of the question involved. The courts under a variety of circumstances have held that grants of this character to a railroad may be used for many different purposes

without jeopardizing their so-called title under the grant itself; for example, for the construction of saw mills, warehouses, lumber and coal businesses, irrigation ditches, etc., the only limit being that such leases or privileges would not interfere with the operation of the railroad. The majority of these cases, however, refer to uses of the surface for purposes other than the sole operation of the railroad itself. It would not seem to be a strained construction to say that the use of the surface and the use of the subsurface are equivalent so long as neither interferes with the primary purpose of the grant. And so the main point upon which the decision in the case rests must be in accordance with the contention of the plaintiff that the railroad grantee has only such rights as will permit it to operate as a railroad (excluding all mineral rights), as against the contention of the defendant that it can use its right of way in any way it sees fit except it may not use it in a
12 manner which will interfere with its main purpose in the operation of a railroad. In this respect this Court feels that it must support the contention of the defendant.

It seems significant that when the original grant was amended to include alternate sections on either side of the railroad and therein reserved or excepted mineral rights Congress did not change in any respect the right of way provision, thereby suggesting a plausible theory at least that had it been the intent of Congress to reserve mineral rights under the right of way it would have made the same provision in regard thereto as it did in the grant of contiguous lands. It is apparent that Congress some time after these original grants of right of way were made began to make them restrictive in the sense that they were limited exclusively to the uses necessary for railroad purposes. This likewise would seem to indicate an intent on the part of Congress to change its policy. General Acts of the Congress were passed restrictive in character under which rights of way might be granted over the public domain which are substantially different than the grant in controversy here.

In accordance with the foregoing views the decision of the Court will be for the defendant. Being a case tried to the Court, without the intervention of a jury, it will devolve upon counsel for defendant to formulate findings of fact and conclusions of law, together with an appropriate judgment, which findings and conclusions may include such fundamental declarations as are inherent in the above announced decision, in collaboration with plaintiff's counsel if agreeable and convenient. Such findings, conclusions and judgment may be submitted to the Court on or before January 14, 1955, and an order will be entered accordingly.

Filed December 30, 1954.

In United States District Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW.—January 14, 1955

The above-entitled cause came on for trial by the Court without a jury on November 15, 1954, and the Court, having duly considered all matters before it, including oral and written evidence produced by the parties, the stipulation of facts between the parties, and the arguments and briefs of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. This is an action brought by the United States, and this Court has jurisdiction pursuant to the provisions of 28 U.S.C. 1345.

13 2. Defendant, Union Pacific Railroad Company (sometimes hereinafter referred to as Union Pacific), is a corporation duly organized and authorized to do business under the laws of the State of Utah.

3. By the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States granted to a predecessor in title of the defendant a right of way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line. Said Act of July 1, 1862 also contained a grant in fee simple by the United States to the railroad of certain alternate sections on both sides of the right of way, but this grant of alternate sections contained a specific exception of mineral lands. The Amendatory Act of July 2, 1864 enlarged the grant of alternate sections to the railroad, continuing the exception of mineral lands from such grants but providing that the term mineral lands does not include coal and iron lands.

4. Defendant, Union Pacific Railroad Company, has succeeded to the rights of the original grantee under said Acts.

5. Defendant and its predecessors have complied in all respects with the provisions of the Acts of Congress referred to in Paragraph 3 hereof. A predecessor of defendant constructed a railroad and telegraph line on the right of way referred to in said Paragraph 3. Defendant, or a predecessor thereof, is now and has been at all times pertinent hereto using the right of way for the purposes set forth in said Act of July 1, 1862. No portion of the right of way involved in this action has been abandoned.

6. A portion of the right of way granted by the Acts of Congress referred to in Paragraph 3 hereof traverses land described as the N-½ NW-¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The nature of the title to and the parties' interest

in said portion of the right of way is the subject of this litigation. Other than with respect to the right of way, there is no dispute that the title to the mineral rights in the land described in this paragraph is and at all times pertinent hereto has been vested in the United States.

7. Defendant intends to engage in drilling operations leading to the removal of subsurface oil and gas within its right of way traversing the N-½ NW-¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The Wyoming Oil and Gas Conservation Commission has approved defendant's application for a permit to drill a well for oil and gas on said portion of defendant's right of way.

8. Defendant's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes.

14 9. Defendant has not applied for or obtained a lease under the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301.

10. It has long been the practice of the defendant when entering into leases of portions of its right of way to reserve the right to retake possession for mineral operations.

11. In the Act of July 1, 1862, 12 Stat. 489, it was the intent of Congress, reflecting the Congressional and public policy existing at that time, to grant to the defendant a fee simple determinable in the lands contained within the right of way, subject only to an implied condition of reverter in the event that defendant ceases to use the right of way for railroad purposes. Congress did not intend to reserve or except minerals or mineral lands from said right of way granted to Union Pacific. It was not the purpose of Congress to restrict the right of way granted to Union Pacific exclusively to uses necessary for railroad purposes, and Congress did not intend to place any limitation upon the grant to Union Pacific except the above-stated implied condition of reverter. Subsequent to the grant to Union Pacific and after 1871, Congress changed its policy and passed general right of way acts which were intended to be more restrictive in character than the grant to Union Pacific.

Conclusions of Law.

1. The Court has original jurisdiction of this civil action commenced by the United States under 28 U.S.C. §1345.

2. By the Act of July 1, 1862, 12 Stat. 489, the United States granted to Union Pacific a fee simple determinable, sometimes called a base, qualified or limited fee, of the lands contained within the right of way, subject only to an implied condition of reverter in the event that Union Pacific ceases to use the right of way.

3. By the Act of July 1, 1862, 12 Stat. 489, Union Pacific acquired the sole right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals within the right of way.

4. The United States neither reserved nor excepted minerals or mineral lands from the right of way granted to Union Pacific by the Act of July 1, 1862.

5. The estate in the right of way granted to Union Pacific is absolute and without restriction, except as to the implied condition of reverter, and Union Pacific is not restricted in the use of its right of way to railroad purposes only. Union Pacific can use its right of way in any way it sees fit except that it may not use it in a manner which will interfere with the operation of the railroad, and thus Union Pacific can engage in operations for the production of oil, gas and other minerals so long as they do not interfere with the primary purpose of the grant.

6. The United States is not entitled to an injunction restraining Union Pacific from using its right of way for the purpose of drilling for and removing gas, oil and other minerals.

7. The Act of May 21, 1930, 46 Stat. 373, is not applicable in this case because the United States has no interest in the oil and gas within the right of way.

8. The Court overrules the objections made by plaintiff to the evidence presented by defendant's witnesses, Lee S. Osborne, William C. Perkins, Graydon Oliver and William J. Sackriede.

9. The United States is not entitled to the relief prayed for in the complaint, and the complaint should be dismissed.

10. The defendant is entitled to judgment.

Dated: January 14, 1955.

T. BLAKE KENNEDY,
Judge.

No Objections As To Form.

——,
Attorney for Plaintiff.

WARREN M. CHRISTOPHER,
Attorney for Defendant.

Filed January 14, 1955.

In United States District Court

JUDGMENT.—January 14, 1955

This action came on for trial by the Court on November 15, 1954, and the Court having considered the oral and written evidence pro-

duced by the parties, the stipulation of facts submitted by the parties, and the arguments and briefs of the parties, and having this day entered its findings of fact and conclusions of law, it is by the Court this 14th day of January, 1955,

16 Adjudged, ordered and decreed that the defendant have judgment; that the defendant has an estate in a fee simple determinable in its right of way granted pursuant to the Act of July 1, 1862, 12 Stat. 489, subject only to an implied condition of reverter in the event defendant ceases to use the right of way for railroad purposes; that defendant has the sole and unrestricted right to drill for, remove, use and dispose of the subsurface oil, gas and other minerals underlying the right of way so long as such operations do not interfere with railroad operations; that the plaintiff is entitled to no relief against the defendant, and that the complaint be and is hereby disinissed.

T. BLAKE KENNEDY,
Judge.

No Objections As To Form.

——— ———,
Attorney for Plaintiff.

WARREN M. CHRISTOPHER,
Attorney for Defendant.
Filed January 14, 1955.

In United States District Court

NOTICE OF APPEAL—Filed March 10, 1955

Notice is hereby given that the United States of America, plaintiff above, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on January 14, 1955.

UNITED STATES OF AMERICA,
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys, Department of Justice,
Washington, D. C.
JOHN F. RAPER, JR.,
United States Attorney,
District of Wyoming.

Filed March 10, 1955.

17 (By orders of April 6, 1955, and May 25, 1955, the time for docketing the cause in the Court of Appeals was extended to June 23, 1955.)

In United States District Court

STATEMENT OF POINTS TO BE RELIED UPON BY THE UNITED STATES ON APPEAL—Filed June 3, 1955

The United States of America, appellant, pursuant to Rule 75(d), F.R.C.P., makes the following statement of points to be relied upon on appeal:

(1) The district court erred in finding (Fdg. 11) that by the Act of July 1, 1862, 12 Stat. 489, Congress did not intend to reserve from the grant of the right of way the minerals (oil and gas) underlying such right of way, and in finding that it was not the purpose of Congress to restrict the right of way exclusively for uses necessary for railroad purposes.

(2) The district court erred in concluding (Concl. 2) that the defendant acquired a fee simple determinable, a base, a qualified, or a limited fee in the right of way, subject only to an implied condition of reverter, insofar as such conclusion purports to hold that the defendant railroad company has any right, title, or interest in oil and gas and other minerals underlying such right of way.

(3) The district court erred in concluding (Concl. 3) that under the Act of July 1, 1862, 12 Stat. 489, the defendant railroad company acquired the right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals within the right of way.

(4) The district court erred in concluding (Concl. 4) that the United States did not reserve or except the minerals underlying the right of way granted by the Act of July 1, 1862.

(5) The district court erred in concluding (Concl. 5) that the estate granted to defendant in the right of way is absolute and without restriction, except as to an implied condition of reverter; and in concluding that the defendant company has any right whatever to engage in operations for the production of oil, gas, and other minerals underlying the right of way.

(6) The district court erred in concluding (Concl. 6) that the United States is not entitled to an injunction restraining the defendant company from using its right-of-ways for the purpose of drilling for and removing gas, oil and other minerals.

18-19 (7) The trial court erred in concluding (Concl. 7) that the Act of May 21, 1930, 46 Stat. 373, has no application to this case and in concluding that the United States has no interest in the oil and gas within the right of way.

(8) The district court erred in concluding (Concl. 9) that the United States is not entitled to the relief prayed for, and in concluding that the complaint should be dismissed.

(10) The district court erred in concluding that the defendant is entitled to judgment.

(11) The district court erred in adjoining that the defendant company has any right, title, or interest in the oil, gas and other minerals in the right of way, and erred in dismissing the complaint.

(12) The district court erred in not finding, concluding, and adjudging that the defendant company has no right, title, or interest in the oil, gas, and other minerals within the right of way, in not finding, concluding, and adjudging that such minerals belong to the United States, and in not adjudging that the United States is entitled to the injunctive relief prayed for.

PERRY W. MORTON,
Assistant Attorney General.
JOHN F. RAPER, JR.,
United States Attorney,
Cheyenne, Wyoming.
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys, Department of Justice,
Washington, D. C.

Filed June 3, 1955.

Clerk's Certificate to foregoing transcript omitted in printing.

20 In United States Court of Appeals for the Tenth Circuit

Caption omitted

21 In United States Court of Appeals

ARGUMENT AND SUBMISSION—January 3, 1956

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard and was argued by counsel, Fred W. Smith, Esquire, appearing for appellant, William W. Clary, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

22 In United States Court of Appeals

OPINION—February 24, 1956

Fred W. Smith (Perry W. Morton, Assistant Attorney General, John F. Raper, Jr., United States Attorney, and Roger P. Marquis were with him on the brief) for Appellant;

William W. Clary, (Loomis, Lazear & Wilson, John U. Loomis; O'Melveny & Myers, Louis W. Myers; Warren M. Christopher and Charles H. McCrea were with him on the brief; Frank E. Barnett, W. R. Rouse, J. H. Anderson, and Henry M. Isaacs, of counsel) for Appellee.

Before HUXMAN, MURRAH, and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

23 The United States brought this action for a determination of its right to oil and gas, or other minerals, underlying a portion of the Union Pacific right of way in Wyoming, and to restrain the Union Pacific Railroad Company from removing oil and gas from such lands. The single question presented is whether the right of way grant in Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491, conveyed to the predecessor of the Union Pacific such title as to entitle it to develop and take the underlying minerals therefrom.[1] On stipulated facts, the trial court found that the Act granted a fee simple determinable, sometimes called a base, qualified or limited fee title in the right of way, subject only to an implied condition of reverter in the event the company ceased to use the right of way for the purpose of the Act, which title carried with

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[1] A stipulation of the parties states their claims as follows:

"6. Defendant claims that under the Acts of Congress set forth in Paragraph 3 hereof, it received a present grant in fee simple determinable (sometimes called a base, qualified or limited fee) of the lands contained within the right of way and acquired the sole and unrestricted right to drill for, remove, use and dispose of the subsurface oil, gas, and other minerals underlying the right of way. Plaintiff claims that the defendant acquired the right to use the right of way only for railroad and telegraph purposes, that defendant acquired no right to use any portion of the right of way to drill for or remove subsurface oil and minerals, that the oil, gas, and mineral deposits underlying the right of way remain the property of the United States and subject to its control and disposition, and that plaintiff is entitled to the relief prayed for. The purpose of this case is to adjudicate those claims and determine the relative rights of the United States and the defendant in the oil, gas, and other minerals underlying the right of way."

it the right to remove the subsurface oil and gas, and other minerals. 126 F.Supp. 646. A judgment was entered dismissing the
24 action.

The aforementioned Section 2 of the Act of July 1, 1862, reads as follows:

> "Sec. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this Act and required for the said right of way and grants hereinafter made."

Section 3 grants to the predecessor of the Union Pacific alternate sections over a limited area along the right of way. It provides that "all mineral lands shall be excepted from the operation of the Act." Section 4 fixes the time when patents shall issue for
25 the alternate sections. It is stipulated that the Act has been complied with and it is not contended that the drilling for oil and gas on the right of way will interfere with the operations of the railroad or the use of the right of way for railroad purposes.

The question of the extent of the estate conveyed in the right of way grants under this Act, and similar Acts during the same period, has been before the courts on numerous occasions. As to those grants, it has been held without exception that the railroad received more than a mere easement over the land. The substance of the decisions is that considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee with an implied condition of reverter to the United States in the event the company ceased to use or retain the land for the purposes for which it was granted. The most important of these are Railroad Co. v. Baldwin, 103 U.S. 426; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114; New Mexico v. United States Trust Co., 172 U.S. 171; Northern Pacific Ry. v. Townsend, 190 U.S. 267; Clairmont v. United States, 225 U.S. 551; Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190; Missouri, Kansas & Texas Ry. Co. v. Oklahoma, 271 U.S. 303. These

cases illustrate that the Supreme Court had a clear understanding of the accepted meaning of the terms "easement", "right of way", "limited fee", and "fee title". The grants considered in the foregoing cases were all made during the period 1850 to 1871. During this period it was considered of utmost national importance
26 that a railroad be constructed to the west coast of the United States and to other areas of the west and northwest. Indeed, the Supreme Court, in referring to the Union Pacific grant, said in United States v. Union Pacific R.R. Co., 91 U.S. 72, 79, that "many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."[2] At the time Congress

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[2] These circumstances, the court described in part as follows:

"The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. * * * It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. * * *

"Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the securing a road which could be used for its own purposes." See also United States v. D. & R.G. Ry. Co., 150 U.S. 1; Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618.

did not consider these grants as bounties or gratuities be-
27 stowed upon the railroads but a means of inducing capital to construct railroads, under the most hazardous conditions, for the benefit of the nation. The grants were in the nature of proposals which the company could accept or reject. Nadeau v. Union Pacific R.R. Co., 253 U.S. 442; Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 679. The inclusion of the right of way grant was an important part of the proposal and the inducement. Railroad v. Baldwin, supra.

To accomplish this national need, Congress adopted a policy of granting a right of way to railroads, and in addition the fee title to large areas of non-mineral lands lying on either side of a right of way. This policy came to an end in 1871.

It is urged that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true, but in the Great Northern Ry. Co. v. United States case, 315 U.S. 262, the United States was a party and the precise question under consideration was the right to the minerals underlying the right of way of Great Northern. The rights in that case were acquired under the general Right of Way Statute. (Act of March 3, 1875, 18 Stat. 482, 43 U.S.C.A. Sec. 934). The court carefully analyzed the "limited fee" cases and the Acts from which they arose, and held that under the 1875 Act, the railroad had only an easement in the right of way grant and was not entitled to the underlying minerals.

This result was reached not by overruling, or even criticizing
28 the former cases, but by distinguishing the grants[3] and concluding that the 1875 Act was "a product of the sharp change in congressional policy with respect to railroad grants after 1871. * * *" The court stated that the former cases construed land grant acts before the shift in congressional policy occurred in 1871, therefore were "not controlling here." The court observed that "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement of the right of way granted in the same act." It is significant that in speaking of Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, which held that

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[3] Section 4 required the location of each right of way to be noted on the land plats in the local land offices and "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." The court reasoned that the reserved right to convey the lands subject to the right of way grant was wholly inconsistent with the grant of a fee. There was no such provision in any of the prior acts granting right of way.

a railroad acquiring a right of way under the 1875 Act had a limited fee thereto, the court said:

> "The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act,
> 29 its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in Choctaw, O. & G. R. Co. v. Mackey, 256 U.S. 531, and Noble v. Oklahoma City, 297 U.S. 481, that the 1875 Act conveyed a limited fee are dicta based on the Stringham case, and entitled to no more weight than the statements in that case. * * *"

It appears to us that the language of the Great Northern case is such that no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the "limited fee" cases and held that such title carried with it the right to remove the minerals.

The effect of the Great Northern case was discussed in United States v. Illinois Central R. Co., 89 F.Supp. 17, 23, (affirmed 7 Cir., 187 F.2d 374). In a well-considered opinion, it was held that "on the authority of the Northern Pacific case," the Illinois Central, under a grant prior to 1871, acquired a limited fee to the right of way lands which would entitle it to remove the minerals underlying the surface. We think the reasoning of that case is applicable here.[4]

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[4] In speaking of the effect of the Great Northern case, the court said at page 21:

"In the same opinion (the Great Northern opinion) the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, together with the Union Pacific Grant of July 1, 1862, Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July

30 Generally the terms "limited", "determinable", "qualified", or "base" fee, as applied to the title of real estate, are used synonomously. Because of the possibility that it may endure forever, the owner of such an estate, so long as it exists, even though title may revert upon the happening of a condition, has the same rights as an owner in fee simple and may remove underlying minerals. 19 Am. Jur., Estates, Secs. 28, 30, 31; 31 C.J.S., Estates, Secs. 9, 10; Restatement of Property, Sec. 193, Comment (h); United States v. Illinois Central R. Co., supra; Frensley v. White, 208 Okl. 209, 254 P.2d 982; Davis v. Skipper, 125 Tex. 364, 83 S.W. 2d 318; Johnson Irrigation Co. v. Ivory, 46 Wyo. 221, 24 P.2d 1053, 126 F.Supp. 646.

The United States urges with special emphasis that the record illustrates that it was the policy of the United States, even during the period prior to 1871, to reserve the minerals in lands conveyed.

31 We cannot accede to the correctness of this proposition. It assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving the mineral rights. The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals. Clearly the Act of July 2, 1862 excludes mineral lands from the grant. As stated in Burke v. Southern Pacific R.R. Co. 234 U.S. 669 this "was not a mere reservation of minerals, but an exclusion of mineral lands." See also Terry v. Midwest Refining Co., 10 Cir., 64 F.2d 428, 434. The railroad company could not obtain any title to the mineral lands, if known at the time patent issued, but if, after title passed, it developed that the lands were mineral, the United States had no claim. The passing of title by patent or grant was a determination of the non-mineral character of the land. Burke v. Southern Pacific R.R. Co., supra; Barden v. Northern Pacific R.R. Co., 154 U.S. 288. The exclusion of mineral lands was not confined to the railroad grants but to the homestead and other laws permitting the acquisition of public lands. Burke v. Southern Pacific R.R. Co., supra. The policy of conveying the fee and reserving minerals to the United States was not fully developed until the passage of the Stockraising Homestead Law in 1916, 43

2, 1864, Chap 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."

(P. 23) "On authority of the Northern Pacific case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted."

U.S.C.A. 291, et seq., and the Leasing Act of 1920, 30 U.S.C.A. 181, et seq. We conclude that the Union Pacific, by the terms of the grant, received a limited fee title to its right of way and is
32 entitled to remove the underground minerals.

Affirmed.

33 In United States Court of Appeals

JUDGMENT.—February 24, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

In United States Court of Appeals

CLERK'S NOTE RE MANDATE

By order of April 2, 1956, the mandate was stayed to April 29, 1956.

On May 2, 1956, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

34 Clerk's Certificate to foregoing transcript omitted in printing.

35 Supreme Court of the United States

ORDER ALLOWING CERTIORARI. Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.